

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN LEE MORTENSEN,

Plaintiff,

v.

TARAH FOSTER,

Defendant.

No. 2:22-cv-01773-DJC-CKD P

ORDER

Plaintiff is a former county inmate proceeding pro se. Defendant removed this case from the Butte County Superior Court on October 6, 2022. ECF No. 1. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

On February 22, 2023, the court issued Findings and Recommendations to dismiss this action without prejudice based on plaintiff's failure to inform the court of his change of address upon his release from custody. ECF No. 10. Plaintiff subsequently filed a notice of change of address as well as Objections to the Findings and Recommendations. ECF Nos. 11, 12. In light of plaintiff's change of address, the court will vacate its Findings and Recommendations and proceed to screen plaintiff's complaint.<sup>1</sup>

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<sup>1</sup> In response to an order concerning additional court documents that were returned as undeliverable, plaintiff filed a response confirming his address in Magalia, California. See ECF Nos. 14, 15. A subsequent April 4, 2023 court order served on plaintiff's address of record has not been returned. See ECF No. 16. Therefore, it appears to the court that plaintiff has provided

## I. Screening Requirement

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

A complaint, or portion thereof, should only be dismissed for failure to state a claim upon which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in support of the claim or claims that would entitle him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Palmer v. Roosevelt Lake Log Owners Ass’n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under this standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor, Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

## II. Allegations in the Complaint

Plaintiff sues defendant Foster for deliberate indifference to his serious medical needs in violation of the Eighth Amendment as well as state law medical negligence and malpractice claims. ECF No. 1 at 4. Although plaintiff was a county inmate at the time of filing, it is not

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a valid mailing address.

1 clear who or in what capacity defendant Foster was employed at the Butte County Jail.

2 In a barely legible single paragraph, plaintiff alleges that defendant:

3 falsified reports out of deliberate indifference to the plaintiff's  
4 serious medical needs out of any improper motive and violated  
5 Sec[ti]on 1200 of the title 15 [and] violated the consent decree and  
6 federal Civil Rights Act by failing to treat any injurys [sic] and  
7 leaving me with a[n] infection in my face for 6 months and failing to  
provide pain relief and medical action for medically noted injurys  
[sic] [.]. I was denied the right to use the sick call[.] I went from July  
10-21 to 2-4-22 before medical starting seeing me.

8 ECF No. 1 at 5. As a remedy, plaintiff seeks punitive damages.

9 **III. Legal Standards**

10 The following legal standards are being provided to plaintiff based on his pro se status as  
11 well as the nature of the allegations in his complaint.

12 **A. 42 U.S.C. § 1983 Standard**

13 In order to state a claim under § 1983, a plaintiff must allege that: (1) defendant was  
14 acting under color of state law at the time the complained of act was committed; and (2)  
15 defendant's conduct deprived plaintiff of rights, privileges or immunities secured by the  
16 Constitution or laws of the United States. 42 U.S.C. § 1983; see West v. Atkins, 487 U.S. 42, 48  
17 (1988).

18 **B. Linkage**

19 The civil rights statute requires that there be an actual connection or link between the  
20 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See  
21 Monell v. Department of Social Services, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362  
22 (1976). The Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation of a  
23 constitutional right, within the meaning of section 1983, if he does an affirmative act, participates  
24 in another's affirmative acts or omits to perform an act which he is legally required to do that  
25 causes the deprivation of which complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th  
26 Cir. 1978) (citation omitted). In order to state a claim for relief under section 1983, plaintiff must  
27 link each named defendant with some affirmative act or omission that demonstrates a violation of  
28 plaintiff's federal rights.

### 1           **C. Deliberate Indifference**

2           Denial or delay of medical care for a prisoner's serious medical needs may constitute a  
3 violation of the prisoner's Eighth and Fourteenth Amendment rights. Estelle v. Gamble, 429 U.S.  
4 97, 104-05 (1976). An individual is liable for such a violation only when the individual is  
5 deliberately indifferent to a prisoner's serious medical needs. Id.; see Jett v. Penner, 439 F.3d  
6 1091, 1096 (9th Cir. 2006); Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002); Lopez v.  
7 Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000).

8           In the Ninth Circuit, the test for deliberate indifference consists of two parts. Jett, 439  
9 F.3d at 1096, citing McGuckin v. Smith, 974 F.2d 1050 (9th Cir. 1991), overruled on other  
10 grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc). First, the  
11 plaintiff must show a "serious medical need" by demonstrating that "failure to treat a prisoner's  
12 condition could result in further significant injury or the 'unnecessary and wanton infliction of  
13 pain.'" Id., citing Estelle, 429 U.S. at 104. "Examples of serious medical needs include '[t]he  
14 existence of an injury that a reasonable doctor or patient would find important and worthy of  
15 comment or treatment; the presence of a medical condition that significantly affects an  
16 individual's daily activities; or the existence of chronic and substantial pain.'" Lopez, 203 F. 3d  
17 at 1131-1132, citing McGuckin, 974 F.2d at 1059-60.

18           Second, the plaintiff must show the defendant's response to the need was deliberately  
19 indifferent. Jett, 439 F.3d at 1096. This second prong is satisfied by showing (a) a purposeful act  
20 or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the  
21 indifference. Id. Under this standard, the prison official must not only "be aware of facts from  
22 which the inference could be drawn that a substantial risk of serious harm exists," but that person  
23 "must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). This "subjective  
24 approach" focuses only "on what a defendant's mental attitude actually was." Id. at 839. A  
25 showing of merely negligent medical care is not enough to establish a constitutional violation.  
26 Frost v. Agnos, 152 F.3d 1124, 1130 (9th Cir. 1998), citing Estelle, 429 U.S. at 105-106. A  
27 difference of opinion about the proper course of treatment is not deliberate indifference, nor does  
28 a dispute between a prisoner and prison officials over the necessity for or extent of medical

1 treatment amount to a constitutional violation. See, e.g., Toguchi v. Chung, 391 F.3d 1051, 1058  
 2 (9th Cir. 2004); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Furthermore, mere delay of  
 3 medical treatment, “without more, is insufficient to state a claim of deliberate medical  
 4 indifference.” Shapley v. Nev. Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985).  
 5 Where a prisoner alleges that delay of medical treatment evinces deliberate indifference, the  
 6 prisoner must show that the delay caused “significant harm and that Defendants should have  
 7 known this to be the case.” Hallett, 296 F.3d at 745-46; see McGuckin, 974 F.2d at 1060.

#### 8 **D. Exhaustion of Administrative Remedies**

9 Plaintiff is further advised that under 42 U.S.C. § 1997e(a) “[n]o action shall be brought  
 10 with respect to prison conditions under section 1983 of this title, or any other Federal law, by a  
 11 prisoner confined in any jail, prison, or other correctional facility until such administrative  
 12 remedies as are available are exhausted.”

#### 13 **E. Supplemental State Law Claims**

14 “[I]n any civil action of which the district courts have original jurisdiction, the district  
 15 courts shall have supplemental jurisdiction over all other claims that are so related to claims in the  
 16 action within such original jurisdiction that they form part of the same case or controversy under  
 17 Article III of the United States Constitution.” 28 U.S.C. § 1367(a). However, “once judicial  
 18 power exists under § 1367(a), retention of supplemental jurisdiction over state law claims under  
 19 1367(c) is discretionary” since primary responsibility for developing and applying state law rests  
 20 with the state courts. Acri v. Varian Assoc., Inc., 114 F.3d 999, 1000 (9th Cir. 1997) (en banc).

#### 21 **IV. Analysis**

22 The court finds the allegations in plaintiff’s complaint so vague and conclusory that it is  
 23 unable to determine whether the current action is frivolous or fails to state a claim for relief. First  
 24 and foremost, the court is unable to determine whether defendant Foster was acting under color of  
 25 state law at the time of the alleged constitutional violations. Plaintiff must allege with at least  
 26 some degree of particularity overt acts which defendant engaged in that support plaintiff’s claim.  
 27 Jones v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Moreover, medical  
 28 negligence does not rise to the level of deliberate indifference under the Eighth Amendment. See

1 Frost v. Agnos, 152 F.3d 1124, 1130 (9th Cir. 1998). Merely alleging defendant Foster was  
 2 medically negligent is not sufficient to state a federal claim for relief. Id. As the court has  
 3 concluded that plaintiff has not adequately alleged a federal claim for relief, it declines to exercise  
 4 supplemental jurisdiction over any supplemental state law claims pursuant to 28 U.S.C. §  
 5 1367(c). See Aciri, 114 F.3d at 1000. For all these reasons, the complaint must be dismissed.  
 6 The court will, however, grant leave to file an amended complaint.

7 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions  
 8 complained of have resulted in a deprivation of plaintiff's constitutional rights. See Ellis v.  
 9 Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms how  
 10 each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless there  
 11 is some affirmative link or connection between a defendant's actions and the claimed deprivation.  
 12 Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980);  
 13 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory  
 14 allegations of official participation in civil rights violations are not sufficient. Ivey v. Bd. of  
 15 Regents, 673 F.2d 266, 268 (9th Cir. 1982).

16 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to  
 17 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended  
 18 complaint be complete in itself without reference to any prior pleading. This is because, as a  
 19 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375  
 20 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no  
 21 longer serves any function in the case. Therefore, in an amended complaint, as in an original  
 22 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

### 23 **V. Plain Language Summary for Pro Se Party**

24 The following information is meant to explain this order in plain English and is not  
 25 intended as legal advice.

26 The court has reviewed the allegations in your complaint and determined that they do not  
 27 state any claim against the defendant. Your complaint is being dismissed, but you are being  
 28 given the chance to fix the problems identified in this screening order.

1 Although you are not required to do so, you may file an amended complaint within 30  
2 days from the date of this order. If you choose to file an amended complaint, pay particular  
3 attention to the legal standards identified in this order which may apply to your claims.

4 In accordance with the above, IT IS HEREBY ORDERED that:

5 1. The February 22, 2023 Findings and Recommendations (ECF No. 10) are hereby  
6 vacated based on plaintiff's subsequent notice of change of address.

7 2. Plaintiff's complaint is dismissed.

8 3. Plaintiff is granted thirty days from the date of service of this order to file an amended  
9 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil  
10 Procedure, and the Local Rules of Practice; the amended complaint must bear the docket number  
11 assigned this case and must be labeled "Amended Complaint"; plaintiff must file an original and  
12 two copies of the amended complaint; failure to file an amended complaint in accordance with  
13 this order will result in a recommendation that this action be dismissed.

14 4. The Clerk of Court is directed to send plaintiff a courtesy copy of the form civil rights  
15 complaint for prisoners used in this district should he decide to file an amended complaint.

16 Dated: May 10, 2023



17 CAROLYN K. DELANEY  
18 UNITED STATES MAGISTRATE JUDGE

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